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Supreme Court of The United States

OCTOBER TERM, 1960

NO. 421

THE CAROLINA AMUSEMENT COMPANY, DRIVE-IN THEATRES OF S. C., INC., GREENVILLE ENTERPRISES, INCORPORATED, SPARTANBURG THEATRES, INC., CLAUDE RUMLEY, H. P. McMANUS AND MRS. B. C. WILLIAMS, partners doing business as the GREER DRIVE-IN THEATER, AUGUSTA ROAD DRIVE-IN THEATER CORPORATION, TEXTILE AMUSEMENT COMPANY, INC., PARIS THEATRE COMPANY, INC., STAR THEATRES, INC., J. MASON ALEXANDER, WAKE MEYERS, R.M. CAINE, CALVIN S. TEAGUE and WILLIAM H. BEATTIE, individually for themselves and for other patrons of motion picture theatres similarly situated,

Appellants,

versus

J. R. MARTIN, as Sheriff of Greenville County, South Carolina, B. B. BROCKMAN, as Sheriff of Spartanburg County, South Carolina, and DANIEL R. McLEOD, as Attorney General of the State of South Carolina,

Appellees.

STATEMENT AS TO JURISDICTION APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

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Appellants,

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J. R. MARTIN, as Sheriff of Greenville County, South Carolina B. B. BROCKMAN, as Sheriff of Spartanburg County, South Carolina, and DANIEL R. McLEOD, as Attorney General of the State of South Carolina,

Appellees

STATEMENT AS TO JURISDICTION APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

Appellants submit herewith their statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Supreme Court of South Carolina in Case No. 4596 affirming an Order of the Court of Common Pleas for Greenville County, South Carolina, holding Section 64-1 of the *Code of Laws of South Carolina*

for 1952 constitutional, as against the Appellants' contention that such statute was violative of and in conflict with the First and Fourteenth Amendments to the Federal Constitution.

THE OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported at 115 S. E. 2nd 273. It has not yet been reported in the South Carolina Reports. Copies of the opinion are attached hereto as Appendix A.

JURISDICTION

I

This is an appeal from a decision of the Supreme Court of South Carolina affirming an Order of the Court of Common Pleas for Greenville County, South Carolina holding that Section 64-1 of the *Code of Laws of South Carolina for* 1952 prohibiting the orderly showing of motion pictures on Sunday, even though such showing is legal on any other day of the week, was not violative of nor in conflict with the provisions of the First and Fourteenth Amendments to the Federal Constitution guaranteeing freedom of religion, prohibiting the State establishment of religion and guaranteeing freedom of speech and press, and was not violative of the due process and equal protection clause of the Fourteenth Amendment. Appellants had sought a declaratory judgment that such statute was in conflict with these provisions of the Federal Constitution.

II

The Supreme Court of South Carolina entered its opinion on July 7, 1960 and the time for petitioning for rehearing expired on July 17, 1960, on which date such opinion became a final judgment. Notice of Appeal to this Court was filed by Appellants with the Clerk of the Supreme Court of South Carolina on August 12, 1960.

III

The jurisdiction of this Court upon appeal is conferred by 28 U. S. C. A. 1257 (2). Appellants challenged Section 64-1 of the *Code of Laws of South Carolina for* 1952, a statute of the State of South Carolina, on the ground that, as applied to the orderly showing of motion pictures on Sunday, such statute is repugnant to the Federal Constitution. The decision of the highest Court of South Carolina was in favor of the validity of the statute.

IV

Cases believed to sustain the jurisdiction of this Court on appeal include:

Lovell v. City of Griffin, Ga., 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949;

Burstyn, Inc., v. Wilson, 343 U. S. 495, 72 S. Ct. 777, 96 L. Ed. 1098;

McGowan v. Maryland, U. S. , 80 S. Ct. 874;

Gallagher, Chief of Police v. Crown Kosher Super Market of Massachusetts, U. S. , 80 S. Ct. 876.

V

Section 64-1 is found in Volume 6 at page 277 of the official *Code of Laws of South Carolina for* 1952. The statute is as follows:

> "64-1. Public sports prohibited on Sunday. No public sports or pastimes, such as bear-baiting, bull-baiting, football playing, horseracing, interludes or common plays, or other games, exercises, sports or pastimes, such as hunting, shooting, chasing game or fishing, shall be used on Sunday by any person whatsoever. Every person offending in any of the premises shall, upon conviction, be guilty of a misdemeanor and be subject to a fine not to exceed fifty dollars or imprisonment not to exceed thirty days."

QUESTIONS PRESENTED

I

Is Section 64-1 of the *Code of Laws of South Carolina for* 1952 construed by the Supreme Court of South Carolina as prohibiting the orderly showing of motion pictures on Sunday a valid exercise of the police power or is it in violation of and in conflict with the provisions of the First and Fourteenth Amendments to the Constitution of the United States guaranteeing religious freedom and prohibiting the State establishment of religion when such motion pictures may be lawfully shown on any other day of the week?

II

Is Section 64-1 of the *Code of Laws of South Carolina for* 1952 construed by the Supreme Court of South Carolina as prohibiting the orderly showing of motion pictures on Sunday which may be legally shown on any other day of the week a valid exercise of the police power or is it in conflict with or violative of the First and the Fourteenth Amendments to the Constitution of the United Staes guaranteeing freedom of speech and press?

III

Is Section 64-1 of the *Code of Laws of South Carolina for* 1952 construed by the Supreme Court of South Carolina as prohibiting the orderly showing of motion pictures on Sunday which may be legally shown on any other day of the week in violation of the due process and equal protection clause of the Fourteenth Amendment to the Federal Constitution when other similar amusements, recreations and media of communication are permitted on Sunday?

STATEMENT

I

The Nature Of Appellants' Activities

The Appellants, The Carolina Amusement Company,

Drive-In Theatres of S. C., Inc., Greenville Enterprises, Incorporated, Spartanburg Theatres, Inc., Claude Rumley, H. P. McManus and Mrs. B. C. Williams, partners doing business as the Greer Drive-In Theater, Augusta Road Drive-In Theater Corporation, Textile Amusement Company, Inc., Paris Theatre Company, Inc., and Star Theatres, Inc., are owners and operators of motion picture theatres in Greenville and Spartanburg Counties, South Carolina. The Appellants, J. Mason Alexander, Wake Meyers, R. M. Caine, Calvin S. Teague and William H. Beattie, are patrons of these motion picture theatres who do not subscribe to the religious belief that attendance at motion pictures on Sunday is wrong. These Appellants represent themselves and all other patrons similarly situated.

Prior to 1959, the Appellants who operate motion picture theatres did not open on Sunday because of a ruling by the Attorney General of South Carolina that operation on that day would violate Section 64-1 of the *Code of Laws of South Carolina for* 1952. At that time there had been no South Carolina judicial decision holding that Section 64-1 was applicable to motion pictures.

In 1959 these Appellants, conceiving that this South Carolina Blue Law, not specifically mentioning motion pictures, did not apply to the orderly showing of such on Sunday, and if it did, that the statute would be repugnant to the Federal Constitution, opened their theatres on the Sabbath. They were immediately arrested and charged with violation of this criminal statute and threatened with prosecution as maintainers of a public nuisance and with conspiracy to violate the criminal law.

Rather than subject themselves to repeated arrests and criminal prosecution, and rather than subject their patrons to embarrassment and harrassment by being branded as defiant violators of the law, this declaratory judgment action was commenced in the Court of Common Pleas for Greenville County, South Carolina. Appellants asked that the Court declare Section 64-1 inapplicable to the orderly showing of motion pictures on Sunday or if applicable, that such statute

was violative of and in conflict with the Federal and State Constitutions.

II

The Statute Here Involved

Section 64-1 of the *Code of Laws of South Carolina for* 1952, the statute here involved, was passed in 1712 by the "Most noble Prince, Henry, Duke of Beaufort, Palatine, and the rest of the true and absolute Lords and Proprietors of this Province, by and with the advice and consent of the rest of the members of the General Assembly, now met at Charlestown for the Southwest part of this Province, and by the authority of the same." The statute as found in the 1952 Code is in substantially the same language as originally enacted in 1712.

III

The Case In The State Court

The action was commenced by service of Summons and Complaint on the 9th day of November, 1959, by service upon the Sheriff of Greenville County, the Sheriff of Spartanburg County, and the Attorney General of South Carolina. South Carolina law requires that the Attorney General be made a party in any action in which the constitutionality of the State statute is questioned. The Federal question here involved that this South Carolina Blue Law is repugnant to the Federal Constitution was raised by the Appellants in their Complaint. The Circuit Judge who heard this matter first held that Section 64-1 was applicable to the orderly showing of motion pictures on Sunday and prohibited same. He further held that such statute as construed by him was not violative of any provisions of the Federal Constitution. Appellants in their appeal to the Supreme Court of South Carolina preserved all the Federal questions therein raised by proper exceptions. The Supreme Court of South Carolina in the opinion herein appealed from passed upon the question as to whether or not the statute was repugnant to the Federal Constitution and held it not to be.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I

Section 64-1 As Construed By the Supreme Court of South Carolina Is Repugnant to the First and Fourteenth Amendments to the Federal Constitution Prohibiting the Establishment of Religion By State Law and Guaranteeing Religious Freedom.

In the opinion appealed from the South Carolina Supreme Court held that Section 64-1 prohibited the orderly showing of motion pictures on Sunday even though perfectly legal on any other day of the week. It further held the statute constitutional, the basis of which decision was that such statute was a valid exercise of the police power. No reason is advanced as to how this Blue Law could be said to protect the health, safety, morals and general welfare of the people of South Carolina by prohibiting this innocent recreational activity on Sunday.

Rather, the South Carolina Court held that the same constitutional principles which have in some instances sustained Sunday "no work" statutes were applicable to this Sunday "no selective recreation" statute. Even Sunday "no work" statutes are under critical constitutional attack at this time. *Gallagher, Chief of Police v. Crown Kosher Super Market of Massachusetts,* U.S. , 80 S. Ct. 876. C. F. *McGowan v. Maryland,* U.S. , 80 S. Ct. 874; *Two Guys From Harrison-Allentown, Inc. v. McGinley, District Attorney,* U.S. , 80 S. Ct. 876. Regardless of the outcome of these cases, the constitutional principle which might be argued to sustain the "no work" statutes; namely, that a State has a right to designate a day of rest and may for convenience of enforcement select Sunday as that day, that principle cannot apply here. Here the State of South Carolina is not only attempting to designate a day of rest but in this statute is attempting to designate how their citizens must spend their day of rest, for it prohibits an orderly form of recreation which otherwise might be enjoyed by many citi-

zens, including the patron Appellants in this case, on their day of surcease from labor.

As construed by the Supreme Court of South Carolina this statute serves no possible purpose other than the protection of the Sunday-observing religions which believe that any secular activities or recreation on the Sabbath is irreverent and wrong. To enforce that doctrine by force of law is to establish a State religion and to require adherence by those who do not subscribe to that doctrine is to deprive them of their religious liberty.

If those who believe it irreverent and wrong to engage in innocent and otherwise legal recreational activities on Sunday are correct in their belief, they should be content with logical, moral and spiritual persuasion to convince others and not resort to punitive police action in the name of the State. To do otherwise is the antithesis of religious freedom and the separation of Church and State.

If the State of South Carolina is to be prevented from favoring the views of one religious sect over another, thus establishing a State religion, and if the religious liberty of the individual patrons here involved is to be guaranteed, it must be by this Court, for the South Carolina Supreme Court has refused to erect "a wall of separation between Church and State" in this area and has refused to recognize and protect these basic fundamental constitutional rights. This Court has a long history of deep concern and effective action for the protection of basic constitutional rights of individual citizens and the protection of religious freedom.

II

Section 64-1 As Construed By the Supreme Court of South Carolina Is Repugnant to the First and Fourteenth Amendments to the Federal Constitution Guaranteeing Freedom of Speech and Freedom of Press.

Although motion pictures are a form of recreation and entertainment they are also a significant media for the communication of ideas and they are an important organ of public

opinion. *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L. Ed. 1098; *Kingsley International Pictures, Inc. v. Regents of N.Y.U.*, 360 U.S. 685, 79 S.Ct. 1362, L. Ed. .

It is not contended that reasonable regulations and restrictions upon free speech may not be imposed in the exercise of the State's police power but here it is attempted to prevent and to arbitrarily condemn the orderly showing of motion pictures on Sunday for no reason other than such is desired by a segment of the population believing in a still Sabbath. Nowhere is there any intimation that there is any clear and present danger in the exercise of this free speech on Sunday. Nowhere is it suggested that a statute prohibiting the reading of books, magazines or newspapers on Sunday would be a valid exercise of the police power. Nowhere is it suggested that the State of South Carolina would have the power to restrict the operation of television and radio stations on Sunday. It is only the particular media of communication as epitomized by the motion picture industry that is sought to be hampered or restricted. Since motion pictures are within the basic protection of the First and Fourteenth Amendments as they relate to free speech and free press and since no reason has been advanced nor can be advanced as to why the exercise of free speech and free press through the orderly showing of motion pictures should be prohibited on Sunday in the exercise of the police power it seems clear that basic constitutional rights are being infringed without valid reason or reasonable necessity by the State of South Carolina. All the Supreme Court of South Carolina said in justification of its position on this subject was, "Of course, they are subject to the reasonable regulations of the police power, of which we think our Sunday sports and amusements law constitutes one." It is nowhere even intimated as to how such claimed use of the police power would promote the safety, health, morals or general welfare of the citizens of South Carolina. If these basic constitutional rights are to be preserved for the citizens of South Carolina it must be by action of this Court.

Section 64-1 As Construed By the Supreme Court of South Carolina Is Repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Although Section 64-1 has been construed by the Supreme Court of South Carolina to prohibit the orderly showing of motion pictures on Sunday another statute in South Carolina, i.e., Section 5-103 of the *Code of Laws of South Carolina for* 1952 permits the showing of motion pictures in certain Counties of the State having a specified population during certain hours of the day not in conflict with regularly scheduled Church services provided such operators obtain special licenses issued by the governing body of the municipality or County involved. Counties where such is permitted range from Counties having a City with a population in excess of 62,000, to one having a City between 15,000-16,000, to one having a City with an exact population of 5,747 according to the 1940 Census.

Since Section 64-1 is a statewide criminal act it is arbitrary for the Legislature to make it lawful to operate motion pictures in certain parts of the State on Sunday during certain hours and on the other hand make it unlawful under the same condition in other parts of the State when the permissive distinction is based entirely upon the population of the areas.

Section 64-1 arbitrarily selects certain recreations for prohibition on the Sabbath. Some are obviously disorderly sports while others such as the orderly showing of motion pictures are distinctly peaceful and perfectly innocent recreations. On the other hand other recreations and amusements such as skating rinks, bowling alleys and swimming pools are in no wise interfered with. Similarly, no South Carolina statute attempts to interfere with the exhibition of film on television stations or the playing of music on radio stations on Sunday. To arbitrarily and without any attempt at justification select motion pictures for discriminatory prohibition on Sunday deprives the operators of the valued property of Sunday patronage without due process of the law and fails to extend to them

the equal protection of the law. It likewise deprives the patrons who desire to take their recreation on Sunday in a comfortable and orderly theatre of their right to do so. Particularly is this true since many patrons of the theatre work six days a week and Sunday is the only day in which they may enjoy this form of recreation. This deprives these patrons of the equal protection of the law in that they are unable to participate in the orderly form of recreation which they prefer and are compelled instead to resort to other forms of recreation arbitrarily permitted by the statute or no recreation at all.

CONCLUSION

Appellants respectfully suggest that this appeal brings before this Court Federal questions which are far reaching and important in the area of basic constitutional rights involving separation of Church and State, religious freedom, freedom of speech and press, due process and equal protection. These are matters of great concern to a large segment of the population and involve direct State action which we respectfully submit is repugnant to the Federal Constitution.

Enough has been said to demonstrate that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,
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APPENDIX "A"

STUKES, C. J.: This is an action for declaratory judgment (1) that Section 64-1 of the *Code of Laws of South Carolina of* 1952 is inapplicable to the orderly showing of motion picture theatres on Sunday, or (2) that the statute is invalid because in conflict with the First and Fourteenth Amendments to the Constitution of the United States and article 1, secs. 4 and 5 of the *Constitution of South Carolina of* 1895 The prayer of the complaint is for permanent injunction against the defendants from enforcing the statute against, or interfering with, the orderly showing of motion pictures on Sunday in the theatres of the plaintiff owners and operators thereof.

The cited statute follows:

> "No public sports or pastimes, such as bearbaiting, bull-baiting, football playing, horseracing, interludes or common plays, or other games, exercises, sports or pastimes, such as hunting, shooting, chasing game or fishing, shall be used on Sunday by any person whatsoever. Every person offending in any of the premises shall, upon conviction, be guilty of a misdemeanor and be subject to a fine not to exceed fifty dollars or imprisonment not to exceed thirty days."

The lower court held that the operation of public moving picture theatres is within the statute and is prohibited thereby on Sunday; and that the statute is not violative of any of the provisions of the Federal or State Constitutions. The plaintiffs have appealed.

Appellants' first point is that motion pictures are not within the terms of the statute, being unknown at the time of its enactment. We think, however, that they are embraced in the words of the statute, interludes or common plays. The word "plays" denotes theatrical performances and Webster defines an interlude as follows: "An entertainment of a light or farcical character introduced between the acts of the old mystery and morality plays or forming a feature of a festival, fete, etc.; hence, one of the farces or comedies to which these entertainments gave rise; also, formerly, any popular drama."

So far as the purpose of the statute is concerned, we see no distinction between a theatrical performance on a stage and one projected on a screen.

Golf was probably unknown to the framers of the statute but it was considered as within it, and prohibited by it on Sunday if public or professional, in *Palmetto Golf Club v. Robinson*, 143 S. C. 347, 141 S. E. 610. Professional baseball, although unknown at the time of the passage of the Sunday law, was taken by court and counsel to be within the ban of it in *Greenville Baseball, Inc., v. Bearden*, 200 S. C. 363, 20 S. E. (2d) 813. Motion pictures were similarly so considered in *Greenville Enterprise, Inc., v. Jennings*, 210 S. C. 163, 41 S. E. (2d) 868. In the case just cited it appears that two of the plaintiffs there are two of the appellants here. They did not then contend for the construction of the law which they now assert. Rather, they agreed with our construction. Automobile racing was held to be within the ban of the statute, although unknown at the time of its enactment, in *Bishop v. Hanna*, 218 S. C. 474, 63 S. E. (2d) 308, 24 A. L. R. (2d) 808. The last cited case contains a history of the law which has been of force, largely unchanged, since the year 1712.

In apparent recognition of the obstacles to them of the decisions in the *Palmetto Golf Club case* and *Bishop v. Hanna*, both *supra*, appellants petitioned for, and were granted, leave to argue against them. However, upon careful consideration, the court adheres to them and will not reverse or modify them. The authority of them dictates affirmance of the judgment in the instant case.

As was pointed out in *Bishop v. Hanna*, *supra*, the legislature has consistently construed section 64-1 as prohibiting exhibition of motion pictures on Sunday. Sections 5-103 and 5-104 of the Code permit such on Sunday in certain localities, at fixed times and under specified conditions. Of course, this legislation would have been unnecessary if Sunday movies were not prohibited by Sec. 64-1. (So would the case of *Greenville Enterprise, Inc. v. Jennings*, *supra*, brought by two of the instant appellants, have been unnecessary if Sunday movies were not prohibited by section 64-1.)

Appellants cite the rule of strict construction of criminal statutes. Such contention is disposed of as was done in *Bishop v. Hanna, supra,* in the following language.

> "Because of the cited prior construction of the statute by this Court, which is not out of line with that of other courts with respect to similar statutes or with the view manifested by the subsequent course of legislation in this State, it is unnecessary to add more in reconciliation of it with the rules of strict construction of penal statutes and of *ejusdem generis,* urged in argument by respondents; both contentions were unsuccessfully made in the Palmetto Golf case. However such construction is supported by the following authorities which we take from appellants' brief: 50 *Am. Jur.* 246 et seq., 408 et seq., Statutes, Secs. 250, 389; *Pickens v. Maxwell Bros. & Quinn,* 176 S. C. 404, 180 S. E. 348; and *State v. Johnson,* 196 S. C. 497, 14 S. E. (2d) 24."

As was said in the cited case of *State v. Johnson,* the proper construction of a penal statute is that which finds and puts into effect the intention of the lawmaking body as gathered from a reasonable interpretation of the words of the statute, citing *State v. Firemen's Ins. Co.,* 164 S. C. 313, 162 S. E. 334.

There is cited by appellants *People v. Hemleb,* 127 App. Div. 356, 111 N. Y. Sup. 690, which held that a moving picture theatre is not included within the statute there under construction, which differs materially from ours. Moreover, the decision was not that of a court of last resort and seems not to have been followed in its own jurisdiction. See annotation, 24 *A. L. R.* (2d), at page 841. *Crawford v. City of Pascagoula,* 85 So. 181, held that moving pictures come within a Sunday law which prohibited "interludes, farces or plays of any kind." Of the same result are: *Ex parte Lingenfelter, Tex.,* 142 S. W. 555, and *Zucarro v. State, Tex.,* 197 S. W. 982; the Texas statute, enacted before moving pictures existed, prohibited "circuses, theaters, variety theaters and such other amusements as are exhibited," etc.

> "The exhibition of moving pictures has been held within the application of acts forbidding generally the

giving on Sunday of theatrical representations or performances, the exhibition of 'plays of any kind,' the keeping open of places of public amusement, which are defined as 'circuses, theatres, variety theatres and such other amusements as are exhibited and for which an admission fee is charged.'" 83 *C. J. S.* 834, Sunday, sec. 18b.

There are cases in which moving picture theatres have been held to violate no-work-on Sunday statutes, which is not precisely the question presented here. An example is *Rosenbaum v. State, Ark.*, 199 S. W. 388, L. R. A. 1918B, 1109. The opinion contains an interesting history of the secular and religious origins of the observation of a day of rest. The custom has not been the result only of the precepts of religion. It is said in the 1949 North Carolina case of *State v. Trantham*, 55 S. E. (2d) 198, that the validity of Sunday closing ordinances has been the subject of discussion in at least 1590 cases decided in the various jurisdictions of the United States.

Appellants argue that the legislative intent of section 64-1 was to prohibit only disorderly and noisy public sports or pastimes, such as some of them named are, but that could hardly apply to "interludes or common plays," within which we think that moving pictures come. Moreover, that thought has not been alluded to in our former decisions which have upheld the law. None of them depended upon the noise or disorder of the banned activity.

"According to the present view, Sunday laws are based on the experience of mankind as to the wisdom and necessity, for both the physical and moral welfare of man, of having at stated intervals a day of rest from customary labor. Consequently, such laws have been uniformly recognized as a legitimate exercise of the police power. Since the purpose of Sunday statutes is to promote the physical and moral nature of man, the right to prohibit secular pursuits on Sunday is not affected by the fact that they may be noiseless and harmless in themselves," 50 *Am. Jur.* 808, sec. 9.

The lower court did not err in considering section 64-2

of the Code which forbids work on Sunday, except work of necessity or charity. Exactly the contrary of appellants' contention thereabout was held in the *Palmetto Golf Club case, supra.* (The code sections were then numbers 713 and 715.) They are parallel statutes and together (with the ensuing sections) contain the legislative will with respect to the day of rest. Indeed, they were originally parts of the same enactment; they have been separated by subsequent codifications. II *Statutes of South Carolina* (Cooper's Compilation) 396. The note of Dr. Cooper at page 707 is quoted below to show the grasp of the problem by that great scholar at that early date; it anticipates the constitutional question which will be next discussed:

> "For all the laws of morality arise from and are founded upon the duties of man towards man in a state of society. The affairs of the next world are matters of private belief, not of public cognizance; and the business of society can go on without reference to any religious creed whatever. This principle seems to have suggested the VIII Article of our Constitution, which enacts that 'the free exercise of religious profession and worship, without discrimination or preference, shall forever after be allowed in this State to all mankind.' Constitutional law is the paramount law of the land, and every legislative Act contravening it is *ipso facto* void. This does not interfere with the right of the legislature to incorporate religious societies for civil purposes, nor with the right of appointing a Sabbath or day of rest from labour, as a municipal institution, conducive to civil expedience."

Is the law under attack violative of the First Amendment of the Federal constitution and sec. 4, Art. 1, of the State constitution which in identical terms inhibit laws respecting an establishment of religion or prohibiting the free exercise thereof?

The law was held to be constitutional in *Palmetto Golf Club v. Robinson, supra,* 143 S. C. 347, 141 S. E. 610. In the earlier case of *Cain v. Daly,* 74 S. C. 480, 55 S. E. 110, it was said with respect to the no-sale-on-Sunday statute, "The con-

stitutionality of a Sunday law like this is so generally recognized that there is no need to cite authorities in support of the proposition." However, in view of appellants' earnest argument, the question will be discussed.

In *Hennington v. Georgia*, 163 U. S. 299, 16 S. Ct. 1086, 41 L. Ed. 166, the Supreme Court upheld a statute which forbade the running of a freight train on Sunday, although in interstate commerce, and quoted with approval the following from the opinion of the Georgia court by the famed Chief Justice Bleckley:

> "With respect to the selection of the particular day in each week which has been set apart by our statute as the rest day of the people, religious views and feelings may have had a controlling influence. We doubt not that they did have; and it is probable that the same views and feelings had a very powerful influence in dictating the policy of setting apart any day whatever as a day of enforced rest. But neither of these considerations is destructive of the police nature and character of the statute. If good and sufficient police reasons underlie it, and substantial police purposes are involved in its provisions, these reasons and purposes constitute its civil and legal justification, whether they were or not the direct and immediate motives which induced its passage, and have for so long a time kept it in force. Courts are not concerned with the mere beliefs and sentiments of legislators, or with the motives which influence them in enacting laws which are within legislative competency. That which is properly made a civil duty by statute is none the less so because it is also a real or supposed religious obligation; nor is the statute vitiated, or in anywise weakened, by the chance, or even by the certainty, that in passing it the legislative mind was swayed by the religious rather than by the civil aspect of the measure. Doubtless it is a religious duty to pay debts, but no one supposes that this is any obstacle to its being enacted as a civil duty. With few exceptions, the same may be said of the whole catalogue of duties specified in the Ten Commandments. Those of them which are purely and exclusively religious in their nature cannot be, or be made civil duties, but all the rest of them

may be, in so far as they involve conduct as distinguished from mere operations of mind or states of the affections. Opinions may differ, and they really do differ, as to whether abstaining from labor on Sunday is a religious duty, but whether it is or not, it is certain that the legislature of Georgia has prescribed it as a civil duty. The statute can fairly and rationally be treated as a legitimate police regulation, and thus treated, it is a valid law. There is a wide difference between keeping a day holy as a religious observance and merely forbearing to labor on that day in one's ordinary vocation or business pursuit." *Hennington v. Georgia*, 90 Ga. 396, 397-399.

In the later case of *Petit v. Minnesota*, 177 U. S. 164, 20 S. Ct. 666, 44 L. Ed. 716, the conviction of the defendant of keeping open a barber shop on Sunday was affirmed, and the court said:

"We have uniformly recognized state laws relating to the observance of Sunday as enacted in the legitimate exercise of the police power of the state. The subject was fully considered in *Hennington v. Georgia*, 163 U. S. 299, and it is unneccessary to go over the ground again. It was there said: 'The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease.' And these observations of Mr. Justice Field, then a member of the Supreme Court of California, in *Ex parte Newman*, 9 Cal. 502, whose opinion was approved in *Ex parte Andrews*, 18 Cal. 678, in reference to a statute of California relating to that day, were quoted: 'Its requirement is a cessation from labor. In its enactment, the legislature has given the sanction of law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists and statesmen of all nations, as on the necessity of periodical cessation from labor. One day in seven is the rule, founded in experience, and sus-

tained by science. . . . The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced; labor protected, and the moral and physical well-being of society promoted.' Well-nigh innumerable decisions of the state courts have sustained the validity of such laws."

Of the same tenor is the following from the opinion in the earlier case of *Hing v. Crowley*, 113 U. S. 703, 5 S. Ct. 730, 28 L. Ed. 1145:

> "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms in our cities; and their validity has been sustained by the highest courts of the States."

That the day of rest selected by the legislative bodies coincides with the Christian Sabbath is no reason to invalidate the laws, as is forcefully set forth in *State v. Ullner, Ohio*, 143 N. E. (2d) 849, aff'd 150 N. E. (2d) 413; app. dis. for want of substantial Federal question, 358 U. S. 131, 79 S. Ct. 230, 3 L. Ed. (2d) 225, as follows:

> "But it is said that while requiring the observance of one day out of seven as a day of rest is a valid exercise of the police power, that power does not authorize the fixing of a specific day of the week as a day of rest, particularly when the specific day happens to be the day designated by the religion of the majority of the citizens as a day of rest, such as the Christian Sabbath. It is difficult—we think impossible—to make even a convincing argument that such a law has any relation whatsoever to religion, that is anything to do with man's relation to his God. It requires nothing. It imposes nothing. It dictates nothing. It leaves him particularly free to choose his religion and practice it without let or hindrance. If designating a specific week day as a day of rest is beyond the power of the legislature, it must be

for some other reason. We do not think that the legislature is required to assign a reason for fixing a specific day rather than leaving it to individual choice. We think valid reasons could be stated. In passing legislation, it is a proper object to consider the ease or difficulty of enforcement. Now, certainly the power to enforce the observance of a specific day of rest would be much easier than to enforce a day of rest selected by the individual. It would seem that the latter would not only be difficult but, in fact, impossible to enforce. And the fact that a large group is already observing a specific day would be a proper thing to consider, and the selection of that day for that reason would not interfere with anyone's freedom of religion."

Appellants argue that some of the decisions which have been cited are presently inapplicable because they involved no-work-on Sunday statutes, not no-amusements, as here. But the applicable constitutional principles are the same, and it would hardly be contended that a moving picture theatre could be operated without the labor of machine operators, ticket sellers, ushers, etc.

State v. McGee, 237 N. C. 633, 75 S. E. (2d) 783, involved the constitutionality of an ordinance of the City of Charlotte which banned the exhibition of moving pictures during certain hours on Sunday. The ordinance was attacked on the same constitutional grounds on which appellants attack our statute. All were overruled and with respect to the establishment of religion inhibitions the Court said:

"In our opinion, the ordinance is not subject to attack on the ground assigned. There is nothing in it that offends the First Amendment of the Constitution of the United States, or that atempts to interfere with the natural and inalienable right of man to worship Almighty God according to the dictates of his own conscience, as vouchsafed to all citizens in Article I, Section 26, of our State Constitution. The ordinance contains no provision that may be construed as impinging upon the freedom of conscience. It neither purports to compel nor deny the observance of any religious duty. It so happens that the

great majority of people desire to observe Sunday as the day of rest. And measures for its observance do not come from a desire to impose upon the conscience of any individual, but rather to promote the public health, the general welfare, safety and morals of the people and to give them an opportunity to rest from their secular activities. Long before civil governments undertook to exercise their police power to enforce the observance of Sunday as a means of promoting the public health, the general welfare, safety, and morals of the people, Christians had chosen this day in commemoration of the Resurrection, in lieu of the Old Testament Sabbath which fell on Saturday. And the fact that an ordinance may require the cessation of secular pursuits on Sunday during the hours in which churchgoing people usually attend religious services, will not be held unconstitutional, if otherwise reasonable and valid."

People v. Friedman, 1950, 302 N. Y. 75, 96 N. E. (2d) 184, ap. dis., 341 U. S. 907, 71 S. Ct. 623, 95 L. Ed. 1345, upheld against constitutional attack a penal statute which forbade the sale of uncooked meat on Sunday. It was said by the court:

"Nor may we say that section 2147 of the *Penal Law* is unconstitutional because of infringement upon religious freedom. It is not a 'law respecting an establishment of religion, or prohibiting the free exercise thereof.' *U. S. Const. 1st Amendment*. It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion. Although the so-called Sunday laws may be said to have had a religious origin, our statute since 1881, *Penal Code*, Section 259, now *Penal Law*, Section 2140, has also recognized that the first day of the week by general consent is set apart 'for rest,' in accord with the general experience of mankind that it is wise and necessary to set apart such a day at stated intervals for both the physical and moral welfare of the members of a state

or community. The power of the Legislature to regulate the observance of Sunday as a civil and political institution is well settled." (Citing authorities, some of which have been reviewed herein.)

In the jurisdictional statement filed in support of an unsuccessful appeal of the last cited case to the Supreme Court it was said: "The question • • • is an important one: Are *Hennington v. Georgia* and *Petit v. Minnesota* still law in view of the *Everson v. Board of Education* and *McCollum v. Board of Education* decisions?" 179 F. Supp., at page 948. The Supreme Court said *per curiam*: "The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question." 341 U. S. 907, 71 S. Ct. 623, 95 L. Ed. 1345.

Appellants here cited two recent decisions of the Supreme Court: *Everson v. Board of Education*, 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711, 168 A. L. R. 1392; and *McCollum v. Board of Education*, 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 451, 2 A. L. R. (2d) 1338, referred to in the preceding paragraph. The first held that a State may use tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. The second cited case held that the First Amendment is violated by the religious instruction of public school children, during school hours, in tax-supported school buildings. Both cases applied the First Amendment to the Federal Constitution to State action perforce the Fourteenth Amendment, as to which there is no controversy in this case; neither was concerned with a Sunday law and they are, therefore, irrelevant here; nor is the reasoning of them applicable. In *Zorach* v. *Clauson*, 343 U. S. 306, 72 S. Ct. 679, L. Ed. , the Court differentiated the facts of it from the *McCollum case* and upheld religious instruction of volunteer public school pupils during "released time" in other than school buildings by private instructors. Again, the decision is not in point here, but the following from the leading opinion by Mr. Justice Douglas indicates the constitutionality of Sunday observance laws:

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction."

Prohibiting the public exhibition of motion pictures on Sunday, is the law under attack in conflict with the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution and Art. 1, Sec. 5, of the State Constitution?

This question is presented by appellants' exceptions XIII and XVIII, the former that the law arbitrarily selects one form of recreation to prohibit and permits other types of a similar

nature so far as rest and repose are concerned; and the latter that the law permits Sunday newspapers, periodicals, radio and television.

There is argument in the brief of appellants that equal protection is denied by reason of Code Secs. 5-103, 4, which permit Sunday moving pictures in certain areas of the State under specified conditions, referred to hereinabove. This question was not passed upon by the lower court, is not raised by any of the exceptions, and will not be considered on appeal. That aside, it cannot be gainsaid that the legislature may make reasonable classifications for the purpose of legislation. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369. With reference to equal protection the court said in the last cited case:

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

It was said with respect to equal protection in *People v. Friedman*, *supra*, in which the Supreme Court dismissed appeal per curiam, supra, as follows:

> "Section 2147 may not be said to deny the equal protection guaranteed by the Fourth Amendment by reason of being discriminatory class legislation. The stat-

utory scheme is that of a general prohibition against specified activities on Sunday with some exceptions as to necessities, recreation and conveniences, many of which exceptions merely emphasize that the Legislature recognizes Sunday as a day for rest, play, relaxation and recreation rather than merely as a religious Sabbath. The statutory scheme viewed as a whole is a valid one and does not constitute discrimination. * * * While the statute may not be perfectly symmetrical in its pattern of exclusions and inclusions, the equal protection of the laws does not require a Legislature to achieve 'abstract symmetry' *Patsone v. Commonwealth of Pennsylvania*, 232 U. S. 138, 144, 34 S. Ct. 281, 58 L. Ed. 539, or to classify with 'mathematical nicety' *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, 31 S. Ct. 337, 55 L. Ed. 369; *Borden's Farm Products v. Baldwin*, 293 U. S. 194, 209, 55 S. Ct. 187, 79 L. Ed. 281."

And it was said in *Commonwealth of Pennsylvania v. Grochowiak*, 1957, 136 A. (2d) 145, a Sunday movie case, as follows:

"There is no merit in the contention that appellant has been denied due process and equal protection on the ground that the Act is discriminatory in its terms because it fails to include in its subject matter *all* worldly amusements on Sunday, subjecting them to a prohibition similar to that against the showing of moving pictures. *Bothwell v. York City*, 291 Pa. 363, 370, 140 A. 130. The appellant has relied on the principle of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220. That decision was considered in *People v. Oreck*, Cal. App., 168 P. (2d) 186, 190, and the argument of a denial of equal protection of the laws was discarded in this language: 'Here the claimed discrimination is that those engaged in horse race betting are being prosecuted while those who run other types of illegal betting establishments are not. Such type of discrimination, if discrimination it be, is not within the rule of the above cases. It is not a denial of equal protection that one guilty person is prosecuted while others equally guilty are not.'"

There are annotations which deal with the subject of constitutionality of discrimination by Sunday laws or ordinances as between different kinds of business and amusements in 46 *A. L. R.* 290, and 119 *A. L. R.* 752. In 46 *A. L. R.* at page 291 the editor states: "The general rule is that the classification on which a Sunday law is based is within the discretion of the legislative branch of the government, and will be upheld unless it is clearly arbitrary."

As usual in tests of constitutionality, in the absence of factual showing to the contrary, it will be presumed that the classification of a Sunday law is reasonable. *State v. Loomis*, Mont. 1925, 224 P. 344. And the burden is on one denying its validity to show that there is no admissible hypothesis on which it can be justified. Ibid., 242 P. 344, 46 *A. L. R.* 291. The appellants have not carried the burden here. The law as written and construed by this and former decisions is quite broad and inclusive; it does not single out moving pictures, as said in the exceptions. See the copy of the statute, supra. Only the legality of that activity is now before us.

The same argument was made with respect to radio and television in *State v. McGee*, *supra*, 75 S. E. (2d) 783, a Sunday movie case, and was rejected by the following language: "In our opinion the operation of a motion picture theatre is an entirely different business from that of operating a radio or television station, and these operations may be placed in different classifications. Moreover, the ordinance forbids the operating, during certain hours, of any place of amusement, or the conducting of any show, game or sport where a fee is charged for admission as a spectator, or a fee is charged to participate in any game, sport or amusement. No fee is required to be paid before one can listen to his radio or watch a television show. There is no merit in the contention that the ordinance is discriminatory in this respect." The circulation of newspapers and periodicals cannot seriously be said to be comparable to the operation of a moving picture theatre.

Appellants' last question on appeal is, As construed, is

the statute in conflict with the State and Federal constitutional guaranties of free speech?

For affirmative answer to their question appellants rely on *Burstyn v. Wilson*, 343 U. S. 495, 72 S. Ct. 777, 96 L. Ed. 1098, and *Kingsley Int. Pic. Corp. v. Regents of Univ. of N. Y.*, 360 U. S. 685, 79 S. Ct. 1362, L. Ed. . We do not agree

The *Burstyn case* held that a state may not ban a film on the basis of its censor's conclusion that it is "sacrilegious." Requisite to that conclusion, it was held that motion pictures are within the constitutional protection of free speech and free press. Of course, it did not involve a Sunday law, and the Court expressly said, which is of significance here: "It does not follow that the constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places." The *Kingsley case* again upset New York's censorship of a motion picture, Lady Chatterley's Lover, and re-affirmed that moving pictures are within the protection of the First and Fourteenth Amendments—free speech and free press.

Nowhere in our law which is under construction are the rights of free speech and free press impinged upon. The cessation of the commercial exhibition of moving pictures for one day of rest out of seven, in the exercise of the police power of the State, is not an invasion of appellants' constitutional rights of free speech and free press. Following appellants' argument, they might invade the room of a court in session and demand the right to exhibit a film in the name of these freedoms; or a church with worship in progress. Of course, they are subject to the reasonable regulations of the police power, of which we think our Sunday sports and amusements law constitutes one.

This last question of appellants was raised in *Commonwealth of Pennsylvania v. Grochowiak, supra*, 1957, 136 A. (2d) 145, which sustained a conviction for violation of a statute that prohibited the exhibition of motion pictures on Sunday, except during certain hours. It was disposed of as we have indicated above, quoting from the opinion of the Court:

"Appellant, conceding the validity of Sunday legislation in general, contends that the 1935 Act is unconstitutional in that it infringes upon the right of free speech and of the press. The exhibition of motion pictures is 'within the ambit of protection which the First Amendment through the Fourteenth, secures to any form of "speech" or "the press"' and expression by means of motion pictures is included within these constitutional guarantees. *Joseph Burstyn, Inc., v. Wilson*, 343 U. S. 495, 72 S. Ct. 777, 780, 96 L. Ed. 1098. But these rights of free speech are not absolute rights and a general and nondiscriminatory regulation of them in the public interest usually is not open to constitutional objection. As the Supreme Court said in the Burstyn case: 'It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas.' In *Kovacs v. Cooper*, 336 U. S. 77, 69 S. Ct. 448, 93 L. Ed. 513, it is said: 'The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people.' The proceedings in *Joseph Burstyn, Inc. v. Wilson, supra*, had to do with the content of motion pictures. That case involved the question of the constitutionality of a statute which provided for the censorship of motion pictures. The holding was 'that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is "sacrilegious".' The present appeal does not involve the question of the content or the subject matter of the motion pictures but only the occasion when they may be shown. The 1935 Act has nothing to do with what the pictures portray, the story they tell or the philosophy they stress; content is not within the purview of the Act. For this reason the authorities on which appellant relies have no application. In general a restriction on free speech which merely limits the right as to time or place does not infringe upon the constitutional guarantees. And the

1935 Act in prohibiting the showing of motion pictures on but one day of the week without any limitation on their exhibition on the remaining six days is not unreasonable. The State in this case had the power to prohibit public amusements and exhibitions on Sunday."

Crown-Kosher Super Market v. *Gallagher*, 176 F. Supp. 466, and *Two Guys from Harrison-Allentown* v. *McGinley*, 179 F. Supp. 944, are discussed in the briefs. They are conflicting decisions of separate three-judge Federal courts. The Supreme Court has agreed to review both of them. 80 S. Ct. 876. We do not think that we should delay decision of the case at bar until action on those cases by the Supreme Court because, in the first place, it may well be not controlling of the issues here; and, in the second place, another three-judge Federal court awaits this decision. Heretofore some of the instant appellants instituted an action in the Federal Court seeking a judgment of invalidity of Code Sec. 64-1 as violative of the Federal constitution. A three-judge court was convened to hear the case. It, by order dated Sep. 8, 1959, abstained from exercising jurisdiction until such time as this court should have passed upon the constitutionality of the statute as applied to motion pictures. Under these circumstances we think that courtesy requires that we decide the case without delay.

In the *Crown Kosher case* by a divided three-judge Court, with a strong and persuasive dissent, the Massachusetts Sunday closing law was held invalid as applied to the complainants as violative of the First and Fourteenth Amendments. The plaintiffs were a corporation and some individuals who were officers, stockholders, or customers of the corporation, all of whom were Orthodox or Conservative Jews, and an Orthodox Jewish Rabbi. The corporation, its officers and employees violated the Massachusetts Sunday closing law by keeping the super market open on Sundays after 10 A. M. They closed on Saturday, the Jewish Sabbath, and on other Jewish holidays, but kept open not only on Sundays but on Christmas Day, the Fourth of July and other national and

State holidays, inferably thereby profiting at the expense of their lawabiding competitors. The majority of the court sustained both prongs of the constitutional attack but laid more stress upon due process and equal protection. They held that the State law violated the First Amendment because of its religious origin and was not a day of rest statute although the Supreme Judicial Court of Massachusetts had held otherwise in *Commonwealth v. Chernock*, 336 Mass. 384, 145 N. E. (2d) 920. Chernock was a stockholder and manager of Crown Kosher and had been convicted in the State court for violation of the statute. The decision is contrary to the well-nigh unanimous rule that such statutes are regarded as day of rest statutes, despite their religious origin, as we hold in the instant case, in accord with the many authorities which have been cited and a multitude of others which could be cited. However, as said, the majority of the court seem to have attributed more importance to the violation of due process and equal protection which they found from the numerous exceptions and exemptions in the law which came from seventy-odd different amendments of it during the years. The law was described as an almost unbelievable hodgepodge, as prolix, irrational and whimsical. None of these adjectives can be applied with accuracy to our Sunday Law which is under construction. With reference to the First Amendment, it seems to us that the court overlooked the fact that the plaintiffs in the case were representatives of a small minority and that the law imposed by the majority cannot be shaped or bent to accommodate their convenience or serve their financial ends. We think that the dissenting opinion, certainly with respect to the First Amendment, is in conformity with, and representative of, the great body of the law of this country upon the subject. We quote the following legal philosophy from it:

> "The courts of the United States, the courts of the States, and those who help to frame our laws and who help to chart our way of life must make certain that the line is held within the law against any person who would make the law nothing more than an instrument for destroying religion in the name of de-

mocracy. I believe that this should be the credo of all people regardless of their religious beliefs. It must never be forgotten that ours is a government of laws predicated upon majority rule, and it must be remembered that when this day was set the States of the Union had each reserved to itself the right to enact statutes within the boundary lines of its constitution for the comfort, safety, and convenience of its people and the spirit of rest, comfort, and quietness of a Sunday in the lives of the people of Massachusetts, with the importance of having in mind other economic factors, and with the recognition of the value of the obligations and responsibilities of parents and the happy relationship of members of families associated with this day which not only has the aspects of rest, recreation and association, but also spiritual reflection. We cannot become prisoners of a false philosophy, which is truly dialectical materialism, and which in plain language represents the philosophy of Marx, Engel and Lenin, neither can we deny the right of others to disagree with our point of view. But is the person promoting this suit actuated by the spirit of the early founders of this great country, is he safeguarding the rights and privileges of our American society or is he using this as a medium by which to destroy these spiritual and economic values, the inevitable result of which might well be the complete destruction of our way of life? And if this were to happen, of what value would our constitution and laws, and our democratic way of life."

The *Two Guys from Harrison-Allentown case* is of opposite result to that of the *Crown Kosher case*, again by a divided court but the dissenter appears not to have based his dissent upon the conclusion that the Pennsylvania Sunday closing statute there under review violated the First Amendment. The majority relied upon the authority of *People v. Friedman*, supra, and the action of the Supreme Court in dismissing the appeal for the want of a substantial Federal question, supra, 341 U. S. 907, 71 S. Ct. 623, 95 L. Ed. 1345, just as it was relied on in the dissenting opinion in the *Crown Kosher case*. The contrary result of the Crown Kosher case was noted but it was not followed in view of the Supreme

Court precedent of the *Friedman case*. We quote from the opinion with respect to the latter:

> "Thus, the Supreme Court in the Friedman case was faced with very substantial indicia of the statute's relation to religion, strikingly similar to those appellant urges upon us now. We can see no basis for reasoning that the Pennsylvania statute is unconstitutionally related to an establishment of religion without bringing the New York statute under the same interdiction. Yet, the Supreme Court sustained the New York statute summarily. If the view of the establishment of religion question thus authoritatively established by the Supreme Court is to be changed it is for that Court, not an inferior court, to do so. Our conclusion that the Friedman case has broad and controlling significance on the issue of establishment of religion is contrary to the view of the majority of the three-judge district court which recently decided *Crown Kosher Super Market of Mass. v. Gallagher*, D. C. D. Mass. 1959, 176 F. Supp. 466. That opinion disposes of this problem of controlling authority in a brief footnote which is not elaborate enough to make the court's reasoning clear to us. It affords no useful critique of our own analysis which indicates that the Friedman precedent is controlling."

In summary: religious influence doubtless inspired the original enactment of our statute, which was more than two centuries ago; but for many decades it has been re-enacted in our decennial codes of laws, without any reference to religion. We sustain it, as have other courts theirs, as a reasonable exercise of the police power. It is part of the legislative plan for a day of rest and surcease from the usual activities, whether work or amusement, of the other days of the week; and we conclude that it does not offend any provision of the State or Federal constitutions. If revision or repeal is desirable in the public interest, that should be addressed to the legislature, not to the courts.

The exceptions are overruled and the judgment affirmed.

TAYLOR, OXNER and MOSS, JJ., concur.